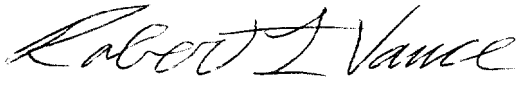
broadcasters will make sure that it is available. Therefore, I propose that no new public interest obligations be imposed on broadcasters as they switch to DTV and that broadcasters be allowed to fulfill their existing obligations on whichever program streams they choose.

Sincerely,



Robert L. Vance

To: William E. Kennard, Chairman–FCC

From: Kenneth H. Berry, Jr.

CC: Professor Glenn H. Reynolds

Date: 03/17/00

Re: Comments on Proposed Rule-making for Broadcaster's Public Interest Requirements in the Age of Digital Transmission Technology

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Dear Commissioner Kennard,

In response to the FCC's request for public comments, 65 Fed. Reg. 4211, (January 26, 2000), I wish to express my views as a citizen that our system of financing elections – local, state, and federal, is dysfunctional. It is dysfunctional principally because of the corrosive effect of money in politics. Your efforts to review the role that television broadcasters should ideally play in our democracy are commendable. It is heartening that the FCC keeps an open mind about the issues it raises in the proposed rule-making, especially considering the many attacks made upon the FCC's jurisdiction by the Republican majority in Congress. I am writing in strong support of the requirement that television broadcasters must contribute free air time to political candidates and parties. My focus will be upon federal candidates but a strong case exists that the requirement should extend to candidates for state and local offices as well.

Introduction and Background

I wholeheartedly support the recommendations made by former FCC General Counsel Geller and others on the Advisory Committee that licensed broadcasters should be required by the FCC to provide free air time before elections. Unlike the views of some, I argue that the FCC has the regulatory authority to accomplish this exceedingly modest approach right now

without further statutory enactments. Furthermore, I will point out several other proposals that are far more ambitious in reach and breadth.

Commissioner Kennard, I must admit that it takes a considerable amount of willpower on my part to refrain from launching into an in-depth recitation of the chamber of horrors that campaign financing resembles. I take solace in the knowledge that the FCC is well aware of how much valuable time, effort, and money is wasted raising funds before, during, and after each election cycle by candidates at probably every level of elective office. You are also well aware that the overwhelming proportion of treasure expended in this regard, is expended in the hunt for dollars to produce commercials and buy television air time.

Unfortunately, politicians have few alternatives to television for effectively spreading their message. Americans are a nation of television viewers. Some might say a nation of television addicts. Be that as it may, digital technology will only exacerbate the problem of too many politicians chasing too many bucks. New digital technology promises to make access to the airways even easier because of the multiplication of available signals, thus politicians will feel driven to put on more spots, which means they will need more money. We face a real risk of the money chase getting more heated not less. It is time to take action and the FCC can and should take the actions outlined below.

<u>What can be done and under what authority</u>

What can the FCC require that broadcast licensees do to fulfill their public interest obligations? Suggestions run the gamut from nothing to coerced devotions of large segments of prime time to all candidates and parties. Besides Mr. Geller's recommendations specifically

mentioned in the proposed rule-making, we can group most suggestions under two broad categories.

First, the simplest and least objectionable category includes variations on the theme proposed by Mr. Geller and others. Namely, broadcasters have a duty to "promote a core value of public interest,"[1] which they can fulfill by providing blocks of free air time during the broadcast day. What differentiates the varieties of the "Geller scheme," if you will, is how much time broadcasters should allot, in what increments, provided to whom, and at what point during a campaign. Subtler refinements of the Geller scheme even address such topics as production value and content, e.g., only the candidate speaking and no surrogates, no background music.

A second, and more progressive, category is the notion of the "time bank." In a time bank approach, networks grant candidates a set amount of air time that the candidates can opt to use whenever wanted. Usually in this approach the "minutes" in the time bank are weighted so that, for example, prime time minutes are "worth," say, twice that of early morning minutes. Another time bank approach would involve the FCC assessing fees of one sort or another on broadcasters, which they would pay into a fund that the agency would then use essentially to

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[1]/Henry Geller, *Article: Public Interest Regulation in the Digital TV Era*, 16 Cardozo Arts & Ent L. J. 341 (1998). In this article, Geller makes essentially the same proposal as that credited to him in the proposed rulemaking. In any event, Geller stresses the importance that "the broadcaster contribute to an informed electorate through . . . political broadcasts," citing the public service requirements of the 1934 Communications Act. While others have characterized this public interest requirement as almost Jeffersonian in nature. *See, e.g.*, Jeffrey A. Levinson, *An Informed Electorate: Requiring Broadcasters to Provide Free Air time to Candidates for Public Office*. 72 B. U. L. Rev. 143 (1992) (wherein he states that "requiring . . . broadcasters to provide free air time . . . would best promote Jefferson's idea of ensuring that Americans are informed and, in [Jefferson's] view, free."

"buy" time for candidates.

In both of the standard models under consideration, debate continues to rage over whether broadcasters should provide time solely to "major" candidates or should they also accord some to political parties as entities to divvy up and distribute as they see fit. In any event, the participants in these debates have not even settled the fundamental question of what is a "major" party or a "major party candidate."

Having sketched in these broad outlines, I would like to commend to your attention several specific recommendations to implement free air time. Afterwards, I will make a personal pitch for my favorite and then move onto the next topic that you solicited commentary on: What authority does the FCC possess to do any of this?

[2]Been there - done that: In 1996 advocates of free air time persuaded some of the nation's major broadcasters to offer two of the presidential candidates some one to two-and one-half minute segments. Another major broadcaster, ABC, offered them, however, an entire prime-time hour on the eve of the November election – both refused.

[3]The 5-percent solution: Also in 1996, Your predecessor at the FCC, Reed Hundt recommended that broadcasters "devote 'a modest 5 percent of programming time' on digital TV." Specifically, he stated that broadcasters should apportion this 5 percent between

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[2]/*Channeling Influence, The Broadcast Lobby and the $70-Billion Free Ride, How Free Air Time for Federal Candidates Can Be Achieved*, at 2 or 5, <http://www.commoncause.org/publications/040297_rpt8.htm>.

[3]/*Id.* at 4 of 5.

"educational TV and free time for candidates." Interestingly, he posited that the increased digital spectrum allowed for even including state and local candidates within the 5 percent plan. In 1996 numbers this approach would today yield about 1,750 hours of free digital air time every year. Unfortunately, Hundt has not sketched out his idea in any greater depth. But it does not require a perceptive genius to envision the FCC directing each national digital broadcaster to make available to each major party a fair proportion of the 5 percent. In this way, the networks could hand off the thorny problem of which candidates at what level they should allot time. Putting the national parties on the hook to work out the problem with their state affiliates and so on down the food chain with each affiliate dealing one-to-one with a broadcaster's affiliate might put meat on the bones of Hundt's proposal.[4]

A five-minute fix: Former journalist and now campaign finance reform gadfly Paul Taylor has proposed that presidential candidates should receive "five minutes of free air time on alternating nights, to be carried by all radio and television stations, for the last five weeks of the campaign."[5]

Two modest proposals: In recent Congressional history, members have proposed many different plans for free air time. Two such representative proposals, one each from the House and Senate, called for "broadcasters to provide free air time for the 45-days before the general

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[4]/One statistical tidbit of which you may not be aware is that as of 1991, every industrialized nation in the world, save the United States, Norway, and Sri Lanka provided some free air time to parties. *Id.*

[5]/Levinson, 72 B. U. L. Rev. at 150 & n.22.

election to all legally qualified candidates for president, vice-president, senator, and representative," and as a condition upon "broadcast license renewal [that broadcasters should] provide at least two hours annually 'to the national organization of each qualified political party' and the "state organization of each qualified . . . party of the state within which the preponderance of the station's audience resides."[6]

Of course, any of the foregoing, in addition to Geller's recommendation, is far preferable to the status quo. However, my specific recommendation in this category of Geller schemes is drawn from a piece of legislation first proposed by then Senator Al Gore, Jr., in 1988.[7] Gore's bill provided that "broadcasters . . . give thirty minutes per week during prime time . . . for the major party presidential nominees . . . in the next to last month before the election. During the . . . last month, the . . . allotment would be raised to one hour, and in the final week . . . one and one-half hours." The relative beauty of Gore's plan, and we are talking about which of the seven dwarves, so to speak, is prettier than the rest, is that it also provides time for house and senate candidates. They would get 5-10-30 minutes each per week in the next to last month before-last month before-week before an election.

[8]A Piggy Bank Approach: As mentioned above, the second category of proposals includes those calling for broadcasters to create time banks. This technique would have media

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[6]/*Id.* at 151 & nn.24-25.

[7]/*Id.* at 158 & nn. 19, 52-58.

[8]/A great discussion of these and other proposals can be found in Reed Hundt, *Article: The Public's Airwaves: What Does the Public Interest Require of Television Broadcasters?*, 45 Duke L.J. 1089, 1105-09 (1996).

donate air time from which candidates could withdraw during their campaigns. Two specific plans Reed Hundt has discussed are worthy of further consideration:

> [O]ne approach would be to grant each eligible candidate a right to a specific dollar amount of free time. Candidates would then negotiate with broadcasters for advertising time, just as they currently do, but would pay with time bank credits rather than actual dollars. Why would broadcasters accept credits? Because they would be required to provide free time worth, say, 2% of their annual advertising revenues as a condition of using the public airwaves for free.

Another approach to which he alludes is one first proposed by columnist William Safire. One aspect of this suggestion is that the FCC can "offer bidding credits to broadcasters [who] could decide to reduce the cash price of their licenses by agreeing to provide "in kind" public service."

Does the FCC have rule-making authority for any of these proposals?

Yes, is the short answer to this question. Although there is a school of thought that provisions of the sort discussed in this comment are clearly violative of, among others, the First Amendment rights of the broadcasters.[9] While others might argue that the types of reforms covered herein require statutory cover.[10] Still, most commentators, including Hundt and Geller, have concluded that the FCC has within its power to review licensing, the additional power to

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[9]/*See, e.g.*, Douglas C. Melcher, *Note: Free Air Time for Political Advertising: An Invasion of the Protected First Amendment Freedoms of Broadcasters*, 67 Geo. Wash. L. Rev. 100 (1998).

[10]/*See, e.g.*, Levinson, *supra* at note 1; Susanna M. Zwerling, *Note: Reclaiming a Public Resource: The Constitutionality of Requiring Broadcasters to Provide Free Television Advertising Time to Candidates for Federal Office*, 18 N.Y.U. Rev. L. & Soc. Change 213 (1991).

attach qualifications to granting those licenses. It derives this power from its congressional mandate to regulate broadcasters according to the "public interest." In fact, the President in an address in 1997 to a conference held at the Annenberg Public Policy Center on the subject of free air time stated that "I have supported the idea of free TV time for many years . . . [and][e]ver since the FCC was created, broadcasters have had a compact with the public: in return for the public airwaves, they must meet public interest obligations." Later in this address the President also stated: "I believe broadcasters who receive digital licenses should provide free air time for candidates, and I believe the FCC should act to require free air time for candidates." Reed Hundt has repeatedly talked about how the FCC "has the power, the precedent, and the procedures to assure free access to the airwaves." The current administration has reiterated its belief that free air time is a public interest obligation and consequently subject to FCC regulation.

I argue that President Clinton, Hundt, Geller, et. al. are on strong ground when they argue that the FCC can regulate free air time. The agency derives this authority from both the old Communications Act of 1934 and the new Telecommunications Act of 1996.[11] Furthermore, the agency derives solid support from the Supreme Court.[12]

Conclusion

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[11]/The Telecommunications Act specifically states: "[n]othing in this [Act] shall be construed as relieving a broadcasting station from its obligation to serve the public interest, convenience, and necessity."

[12]/*See, e.g., Red Lion v. FCC*, 395 U.S. 367 (1969) (where the Court held the FCC's public interest authority included the adoption of the fairness doctrine and that the public owns the broadcast spectrum and their interest should be served.)

Nonstop fund-raising is a problem that besets modern day politics. Politicians need money in ever larger quantities because to compete they feel they must advertise. They feel they must advertise on television to capture the attention of the bulk of the electorate. Our national broadcasters claim countless billions in advertising dollars from politics but many thoughtful and concerned observers contend that this mess can be cleaned up. The shovel with which these reformers wish to clean out the stables is the public interest obligation broadcasters must fulfill to retain their licenses. These reformers argue that the FCC can through its rule making authority require broadcasters to donate free air time to political candidates. Many different sources have forwarded many different suggestions to enact this reform. Examples of the two broad categories under which most of these suggestions fall include mandating blocks of time or time banks.

One of my purposes for writing this comment is to support the proposal of Henry Geller and to propose several others. Another of my purposes in writing, is to lend support to the voices of those who would argue to you that Congress has enabled the FCC to make rules governing granting free air time to political candidates. Therefore, I urge you to give great weight to Mr. Geller's proposal and those I have mentioned herein.

Respectfully,

Kenneth H. Berry, Jr.

William D. Hood
Administrative Law
Professor Reynolds
Spring 2000

Introduction

In response to the Federal Communications Commission's request for public comments entitled "Public Interest Obligations of Television Broadcast Licenses"(FCC 99-390; 47 C.F.R. Part 73), my views are described below. I am a second year law student at the University of Tennessee College of Law. I feel that Digital Television technology offers a unique opportunity to increase the quality of television for all Americans. The transition by many broadcasters from analog service to a digital one provides the Federal Communications Commission an opportunity to promulgate and expand the existing public interest rules. By clarifying the public interest obligations of broadcast licensees specifically in the areas of emergency warnings, political discourse, services to the disabled, and educational programming, digital television technology has the potential to be one of the most significant technological advances enjoyed by all American viewers.

Emergency Warning System

Television has long been the first warning for many Americans in times of impending disaster or emergencies. Many viewers are familiar with the "Emergency Broadcast System," its alarm, and the running line of text that accompanies these warning at the bottom of the television screen. Although these are tremendous advances, with the advent of digital television, broadcasters should be encouraged to go farther and develop a more comprehensive warning system. Paragraph eighteen (18) of the request for comments quotes the Advisory Committee as saying "digital technology will provide innovative and new ways to transmit warnings, such as

pinpointing specific households or neighborhoods at risk, and suggests that digital television broadcasters take advantage of these technological advances." Not only do I agree, but I also would propose that the broadcasters make greater technological advances that include providing safety information specific to the particular area as well.

One of the biggest problems with the present Emergency Broadcast System is that the information provided to viewers is vague and nonspecific. Many television viewers discover that the county in which they live is part of a larger area that is under some type of a warning for potentially damaging or harmful events. The warnings typically create three types of responses in viewers. The first is one of apathy. This type of individual reasons that since every other time a warning is issued he or she is never affected. As a result, this individual does little to prepare for the impending danger. The second type of individual is the cautious one. The cautious individual immediately begins taking precautions once the warning is issued to ensure that he or she is safe should danger come his/her way. The third type of viewer is a combination of the previous two and reacts in the same way depending on their individual assessment of what is going on before deciding how to respond.

All three types of individuals would be better served by the technological advantages of individualized warnings and safety information that digital television make available. The apathetic viewer would be informed only when he or she is at risk. On the other hand, the cautious would know when not to panic. Furthermore, by including safety instructions, both types of individuals would be better prepared to confront whatever potential danger for which they are at risk. Targeted information should include information on how best to prepare for the potential effects of a storm. It could include evacuation information if necessary. If at all

possible, the information could include the location of shelters and aid facilities closest to the area in which the viewer resides. By providing such information the viewer is better informed on how to deal with the situation at hand and can best be best prepared how to avoid a potentially harmful event. When confronted with the potential of damaging weather, I feel confident in saying that most Americans turn to their television for information. In this age of vast technology, such as digital technology, broadcasters should be required to provide the best possible warning devices at their disposal.

The costs of such added benefits seem to far outweigh any additional burden that would be placed on broadcasters. This is confirmed by the Advisory Committee's Report finding cited in paragraph eighteen (18) that "most of these innovations will require only nominal use of the six megahertz (6 MHz) bandwidth allocated to digital broadcasters. Potential arguments against the above proposals probably would fall along the lines of undue cost and increased potential for mistake. All of these problems, though, are outweighed by the public good and are well within the Federal Communications Commission's statutory requirement to "serve the public interest, convenience, and necessity." Further complicating the implementation of such a policy is the question of whether such technology now exists. If not, then the Federal Communications Commission in cooperation with FEMA should promote the development and phasing in of such programs within a certain period of time.

Political Discourse

My second subject for comment deals with those requested on the potential for broadcasters to be used to promote political discourse. As is stated in paragraph thirty-four (34) of the request for comments, and accepted as true by this writer, the Federal Communications

Commission has interpreted the public interest standard to include political campaign programming. The request for comments also correctly states the effect television has on political discourse and apathy in the quoted material from the Supreme Court in the same paragraph. Both of these statements point to a greater responsibility for broadcasters in political discourse. The request correctly concludes that a majority of Americans rely on television for their news and information. This being the case, no better medium provides an opportunity to engage potential voters in one of their more important constitutional rights. Digital television technology further this potential by making interactive information available while viewers are watching their favorite programs. One can easily imagine such abuses as political slogans and propaganda at the bottom of television screens while viewers are watching their favorite nightly programs. Despite this potential for abuse, the availability of air time to potential candidates far outweighs this possibility for abuse.

I support the recommendations made in paragraphs thirty-seven (37) and thirty-eight (38) which would require broadcasters to provide a certain amount of time to each candidate for a particular election each night. For example, as a general election draws near, broadcasters would be required to allow the candidates for state Senator to speak. The following night, the candidates for House of Representatives could speak. Inherent in this recommendation is that certain parameters would be imposed that limited the amount of time available and how far before each election the air time would be made available. Furthermore, using the selectivity that digital television creates, one can imagine allowing local candidates for a specific district within one community being able to speak to only the potential voters in that candidate's district while another candidate speaks only to his or hers. In meeting this requirement, broadcasters should be

left with the discretion to decide what candidates will be allowed to speak on a certain night and at what time that night they will be allowed to use the air time. Finally, it seems well within the Federal Communications Commission's goal of having broadcasters serve the public interest to have them provide air time. It also would appear to be a part of the broadcaster's civic duty that it should do so. Furthermore, ten minutes each night does not seem to be a substantial burden on broadcasters in light of the potential good.

The broadcasters should also be required to provide air time for political advertisements especially for local elections. In paragraph thirty-eight (38), the Federal Communications Commission seeks comments on the proposal of former General Counsel Henry Geller to require broadcasters to provide a certain amount of air time to candidates in advance of a general election. I support this recommendation because of the positive effect it could have for local candidates. Local candidates often find it hard to get their message to the voting public due to the overwhelming cost of television advertisements. By removing this burden, candidates are allowed to get their views to the public, and the public is thereby able to make a more informed judgement. I agree with Geller's suggestion that the licensees should be left to decide what races are to be covered, but I also feel that the burden should be placed on the licensee to show why it chose as it did. Finally, I fully agree with the Advisory Commission's recommendation that the Federal Communications Commission should prohibit broadcasters from making blanket bans on the sale of air time to political candidates. (Paragraph thirty-eight) As is noted time and time again, television is the major source of information for many Americans. To allow blanket bans would undercut the broadcaster's duty to promote the public interest. Broadcasters have a duty to keep their viewers well informed of all events in the community in which they serve and this

includes political discourse.

In making this comment, I feel there should be some provision for review of this type of a program to see if it is working. It seems contradictory to impose these requirements for political air time if the public does not take advantage of the information that it provides. A situation can easily be created where the public pays little or no attention to the air time being provided to political candidates. After a certain number of years, if voter participation has not increased or where there is a backlash against the program, then a review of this requirement would be more than necessary. If it were ever to reach this point, the requirement would clearly have become a burden and therefore outweigh the Federal Communications Commission's duty to promote public interest.

Services to Disabled Viewers

Equally as important as the broadcaster's duty to its viewers regarding political discourse, is its responsibility to its disabled viewers. This duty can be met in two major ways: (1) improving currently available services, and (2) introducing new services that digital technology makes available. Disabled viewers as a matter of public policy deserve to be treated equally and receive the same quality of experience that television affords as non-disabled viewers. Digital television technology offers a truly unique opportunity to improve the quality of television to all viewers.

Closed captioning has greatly improved television quality for hearing-impaired viewers. Like most advances, closed captioning does have its problems. Frequently, closed captioning text and the captions that broadcasters place at the bottom of the screen interfere with one another. As is pointed out in paragraph twenty-four (24) of the request for comments, allowing

viewers to change the size of the text in order to see both the test and the caption would be a significant improvement. The availability of digital technology should be used to expand closed captioning, and it should be used to make closed captioning available for all television programs offered by the broadcaster. Disabled viewers deserve to be able to watch any program they desire and not be limited to watching only those that have closed captioning available. As is mentioned in paragraph twenty-six (26) of the request for comments, broadcasters were to gradually implement closed captioning. With the advent of digital television technology, the time is now to make significant improvement in closed captioning. Clearly "gradually" needs to be replaced with a more stringent requirement such as "as soon as possible, but within reason."

Digital technology also increases the possibilities for new programs to be made available to disabled viewers. Specifically, video description to accompany oral description and conversation would greatly improve television quality for those viewers with sight impairments. I fully agree with the recommendations contained in paragraph twenty-seven (27). With the enhanced capability of digital technology, it is time for broadcasters to take the necessary steps to meet the needs of sight impaired viewers. Video description can create an experience for sight impaired viewers similar to that created by closed captioning that is enjoyed by hearing-impaired viewers. Clearly, video description technology cannot be developed overnight, but digital technology greatly increases the possibility that video description can become a reality. Broadcasters should be required to develop video description technology and provide it to viewers within a time period such as five years. If they are unable to do so, the Federal Communications Commission should require the broadcasters to point to a concrete reason why.

Children's Programming

Finally, digital television technology should be used to improve the quality of television available to children. Specifically, I agree with the views raised by People for Better Television. First, broadcasters should make more educational programming available. For some children, other than school, television is the only other educational medium available to them. They come home from school and immediately turn on the television. Broadcasters should target the after-school hours to show educationally oriented programming. Second, I also agree with People for Better Television's proposal to improve the voluntary rating system. For some parents, this is the only way for them to know what their children are watching. As noted, the increased capability offered by the digital technology makes this more than realistic. These ratings should be associated with the show during promotions of the show as well as when the show is actually being viewed as recommended. Again, both of these programs seem to be well within the FCC's duty to promote the public interest. Broadcasters are already providing educational programs and ratings systems. Requiring them to improve these systems using the available digital television technology does not appear to impose a significant burden on them.

One final comment on the proposals for children's programming I would make is in regard to violence and adult oriented themes that are currently prevalent. I would recommend that broadcasters seek to create a mechanism by which parents could program their televisions to block these types of programs. It would seem to be a viable possibility if each show of this type carried a certain code that when recognized by the television would be refused. Another suggestion, would be to require that when broadcasters provide a range of programming at one specific time slot so that parents can choose what programs their children can watch. This

enables parents to better police what shows are available to their children and provides them with a mechanism to prevent their children from viewing inappropriate shows.

Digital television offers a unique opportunity to improve the quality of television for all viewers. For most Americans, television is the most widely used of all entertainment media available. In meeting its duties to these viewers, broadcasters should be required to use digital technology to improve emergency warning systems as well as provide important safety information in potentially dangerous circumstances. Second, broadcasters' are already required to participate in political discourse by providing air time for commercials, but this responsibility should be expanded especially in local communities. Third, broadcasters in providing services to disabled Americans should be required to offer the best available, state-of-the-art, services. Digital technology should serve as a catalyst to increase broadcasters' responsibilities to disabled viewers. Finally, digital technology offers a unique opportunity to improve the quality of children's programming. As a responsible American, I feel that the Federal Communications Commission should use digital technology as an opportunity to improve the quality of television for all Americans.

Raymond Kyle Williams
1501 Clinch Avenue
Knoxville, Tennessee 37916
March 11, 2000

Federal Communications Commission
445 12th Street, Room TW-A306, SW
Washington, DC 20554

Re: **Public Interest Obligations of Television Broadcast Licensees**
MM Docket No. 99-360; FCC 99-390

Freedom of Speech Implications to Digital Television Regulation

Dear Sir or Madam:

I am writing to you to express my concern over compromises in First Amendment liberties that will result if FCC 99-390, Public Interest Obligations of Television Broadcast Licensees, is used as a vehicle to adopt generic, across-the-board, content-based regulations, restrictions, and obligations. I am a second year law student at the University of Tennessee with not only a professional interest in constitutional liberties, but also a personal stake in the future of my freedom of speech. I have two objections to the approval of new public interest rules for digital television; one a matter of substantive application, another an issue of timing. While free speech within the newer forms of mass communication is not absolute, each standard is evaluated differently according to the inherent characteristics of that particular media medium. Because digital television is not readily accessible by the vast populate and is unlikely to be within the immediate future, this medium should be afforded a higher level of free speech protection subject only to compelling, legitimate government interests. This First Amendment protection should exceed that afforded to television broadcasts and cable communications ensuring the growth of the marketplace of ideas. Secondly, adopting regulations during this the

preliminary stages of the digital transition, while it still remains unclear what form the new services will take, are bound to both vague and overbroad. Quite simply, adopting any form of regulations today would be premature.

FIRST AMENDMENT FREE SPEECH LIBERTIES

When the founders of our country set forth the limitation that "Congress shall make no law . . . abridging the freedom of speech," it is unlikely that any of the authors could envision the protection applying to any form of communicating other than the written or spoken word. It is easy to concede that the framers could not have predicted the emergence of modern communications through radio and television broadcasts, telephone transmissions, cable television, the Internet, and digital television. However, it does not logically follow that these new forms of mass communication would not be afforded the protections and liberties provided by the First Amendment. It is more feasible that the Framers would have encouraged the development of new forms of communication that allow the furtherance of free speech interests and an open exchange of ideas.

The protections and liberties embodied within the text of the First Amendment rest upon "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[1] Supreme Court Justice Oliver Wendell Holmes insisted that the primary goal of the First Amendment was to guarantee a "marketplace of ideas," where truth and honest debate emerged from a multiplicity of voices."[2] The free exchange of ideas within this market serves as a protector of American democracy, a promoter of public discussion

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[1] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[2] Justice Holmes introduced the marketplace of ideas doctrine in Abrams v. United States, 250 U.S. 616, 630 (1919), where he argued:

> [W]hen men have realized that time has upset many fighting, they may come to believe . . . that the ultimate good desired is better reached by free trade of ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . .

of competing ideas, and as a multiplier of people's participation in society and government. This market is essential to our democracy, growth, and future leadership.

In order to protect and ensure a free, unfettered interchange of ideas[3] the Supreme Court has consistently held that it is the role of the judiciary to prevent the government from interfering with the growth of the marketplace of ideas[4]. Because the American political system, culture, and societal life rests upon the forbiddance of government censorship and imposed silences based on content of a message, the Supreme Court insists that such a content-based restriction is presumptively invalid.[5] However, the protection of free speech is not absolute. The Court has carved out instances where the governmental interests outweigh the right of free speech. In determining the amount of free speech protection due and the extent of allowable regulation the Court utilizes different standards based on the speech medium and form of regulation. The Court has followed this approach in its analysis of newly developed forms of speech.

FREE SPEECH & NEW FORMS OF MEDIA

The Court has long held that as new forms of media and mass communication are introduced, new First Amendment standards must be applied to each if there are differences in the characteristics of each new form.[6] In an attempt to modernize First Amendment application

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That at any rate is the theory of our Constitution.

[3] See Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (stating that "[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest concern."); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes. . . .")

[4] See FCC v. League of Women Voters, 468 U.S. 364, 381-82 (1984) (stating that "[t]he freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment."); In re Syracuse Peace Council v. Television Station WTVH, 2 FCC Rcd. 5043, 5056 (1987) (memorandum opinion order) (stating "a cardinal tenet of the First Amendment is that government intervention in the marketplace of ideas . . . is not acceptable and should not be tolerated.")

[5] See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980) (allowing speech restrictions based on time, place, or manner, but not on content); Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) (stating that content-based regulations are presumptively invalid).

[6] Stephen C. Jacques, Reno v. ACLU: Insulating the Internet, the First Amendment, and the Marketplace of Ideas, American Univ. L. Rev. Vol. 46, Book 6 (1997).

to new technology, the Court has established different sets of rules. The Court has used a medium-by-medium approach, when determining the appropriate level of protection that should be afforded to print, broadcast radio and television, telephone communications, and cable television, as each has emerged onto the communications landscape. This "medium-specific" approach to the regulation of mass communication considers each medium separately and applies a balancing approach of competing government interests to each form in a slightly different manner.[7] For the past century the Supreme Court has held that the amount of protection offered to information by the First Amendment depends on the medium by which that information is conveyed.[8] Thus, the same restriction on the same words would be analyzed differently under the First Amendment, depending on whether those words were uttered on a street corner, printed in a newspaper, transmitted through telegraph wire, broadcast through on the radio, spoken into a telephone, or aired over new digital television channels.[9] Simply put, the Court will review the underlying technology and inherent characteristics of each new form of communication before determining whether there exists a government interest that may outweigh the First Amendment liberty of unrestrained speech over that particular medium.

THE AMERICAN BROADCATING SYSTEM

The system of American broadcasting is founded upon three basic principles: (1) the electromagnetic spectrum through which broadcast signals travel has been determined by the government to be public property; (2) broadcasters are granted licenses, at no cost, by the federal government to use a portion of that public property in a limited geographical area; (3) in exchange for the free use of this public property, broadcasters are obligated to act in the public

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[7] Id.

[8] See Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969). Addressing the First Amendment protections of broadcast media, the Supreme Court in Red Lion stated that the "differences in the characteristics of new media justify differences in the First Amendment standards applied to them.

interest, convenience, and necessity.[10] Since this electromagnetic spectrum by which digital television is broadcast has been found to be public property it must be afforded the fundamental protections of the First Amendment in order to be consistent with the scope and purpose of the amendment and the intent of the Framers. However, within this broadcast spectrum there exist differences that necessitate a variety of determinative standards.

Radio and Television Broadcasts

Early in this century the emergence of radio and television broadcasts brought new technology and communication advances into the world of mass media and free speech. In the seminal case of FCC v. Pacifica Foundation,[11] the Court drew new boundaries by establishing how far the government may go in restricting free speech over broadcast radio and television.

In Pacifica, the Court diluted the First Amendment protection afforded to radio and television broadcasts by drawing a distinction between obscene speech and indecent speech. The Court concluded that the FCC law in question prohibited the broadcast not only of "obscene" speech, but also of the less harmful "indecent" speech. The Court afforded the medium of radio and television broadcasting a lower level of First Amendment protection than any other form of mass communication previously considered.[12]

In Pacifica, the Court made clear that the reason for this lower standard of constitutional protection was tied directly to the nature and characteristics of the broadcast medium that set it apart from print communications. The Court noted two specific characteristics of the broadcast media when distinguishing it from print communications: its pervasiveness and its ease of access

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[9] See Fred H. Cate, The First Amendment and the National Information Infrastructure, 30 Wake Forest L. Rev. 1, 3 (1995).

[10] Mark Crispin Miller, Digital Television & the Public Spectrum: What does the Public think Public Interest Obligations should be?

[11] 438 U.S. 726 (1978) (determining primarily whether the FCC has the power to regulate radio broadcast that is indecent but not obscene).

to children.[13] The Court reasoned that the Government was allowed to regulate broadcasting of radio and television because these specific forms of communication have a "uniquely pervasive presence in the lives of all Americans . . . [and are] uniquely accessible to children, even those too young to read.[14] The Government can regulate and restrict the speech of the broadcasts of radio and television based on these criteria without running afoul of the First Amendment even if similar restraints could not be applied to the print medium.[15] It was the unique characteristics of the medium that was the basis for the Court's decision of allowable speech regulation.

Cable Television Communications

With the emergence of cable television, the Court again employed a medium-specific analysis, reiterating its intent to apply different standards of First Amendment protection to new forms of communication based on their unique characteristics.[16]

Although the Supreme Court has not adopted a clear, unequivocal standard in which to measure the required First Amendment protection afforded to cable broadcasts, federal courts have consistently held that cable deserves a level of protection greater than that granted to broadcast communications.[17] The reason behind the greater protection for cable over broadcast communications is the fundamental technological differences between the two mediums. The main difference focused on by the Court was that cable communications do not suffer from spectrum scarcity as do television broadcasts.[18] Since there exists only a limited number of

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[12] "[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection." Id. at 748.
[13] Id. at 748-49.
[14] Id.
[15] See id. at 748 (comparing Red Lion, 395 U.S. 367, which forbids government from forcing newspaper to print replies of those whom they criticize , with Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), which forces broadcasters to give free time to victims of their criticism).
[16] See Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494-95 (1986) (indirectly reaffirming support for different standards for different media, but not deciding specifically the appropriate standard for cable broadcasts, which were viewed as being roughly analogous both to newspapers)
[17] See Turner Broad. Syst., Inc. v. FCC, 512 U.S. 622 (1994).
[18] Id. at 637-39.

broadcast frequencies, unlike the virtually unlimited cable opportunities, the Government and the public have a greater interest in regulating the use of those resources. Since cable communications differed on that factor the Court regarded the medium as deserving the constitutional protection nearing or equaling that of the print media.[19] Only with broadcast communications did the Court find that the unique characteristics, namely its pervasiveness and accessibility to children, justified granting a lower level of protection.

Digital Television

With the transition from analog to digital television (DTV) the debate on regulations and obligations are once again renewed. Presumptively DTV will offer new opportunities and endless possibilities in furthering not only entertainment concerns but could serve as an important cornerstone in public interest duty. Yet, DTV does not exhibit the necessary characteristics that would justify Government intrusion and speech inhibition. DTV does not exhibit the unique characteristics justifying a lower level of protection, namely it is not readily available and accessible to the vast populate. So few people have the expensive television sets needed for watching digital television.[20] During the transition from analog to digital transmissions the electronic industry has tried to digitize the American household. However, this is not economically feasible to all citizens. Sony has lead the industry in its introduction of its flat display Trinitron tube, a high-resolution flat picture display compatible for both the analog and digital spectrum.[21] The costs range from $449.99 for a twenty-inch screen to $2299.00 for a thirty-six inch screen.[22] Such staggering expense makes digital television distinguishable from

[19] See id. at 639. See also Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 116 S. Ct. 2374, 2385 (1996) (characterizing standard of review in Turner as "heightened scrutiny").
[20] Reuters, Cable group opposes DTV rules, November 9, 1998, http://news.cnet.com/new/0-1005-200-335127.html?st.ne.fd.mdh
[21] http://www.sel.sony.com/SEL/consumer/wega/products/index.html
[22] Id.